

STATE OF MICHIGAN  
COURT OF APPEALS

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LINDA L. O'MORROW,

Plaintiff-Appellant,

v

JAMES E. O'MORROW, JR.,

Defendant-Appellee.

UNPUBLISHED

February 8, 2005

No. 250084

Sanilac Circuit Court

LC No. 02-028768-DM

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Before: Wilder, PJ., and Sawyer and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce, in which the lower court refused to award her alimony or attorney fees. We affirm in part and reverse in part.

Plaintiff first claims that the trial court erred in its refusal to award her alimony. We disagree.

This Court must review the trial court's findings of fact in a divorce case for clear error. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). If no clear error exists in the trial court's findings of fact, this Court must decide whether the dispositional ruling was fair and equitable. *Sparks v Sparks*, 440 Mich 141, 151-52; 485 NW2d 893 (1992). The trial court's dispositional ruling regarding alimony is an exercise of discretion and should be affirmed unless this Court is firmly convinced that the decision was inequitable. *Id.* at 152; *Gates v Gates*, 256 Mich App 420, 433; 664 NW2d 231(2003).

First, as to the trial court's comments regarding fault, we believe these remarks, reasonably considered, simply reflect that fault was not an important factor in the present alimony decision, as opposed to incorrectly indicating that it could not consider fault as a factor. Although fault is one of the relevant factors to be considered in cases involving spousal support awards, the trial court must consider *all* relevant factors and not assign disproportionate weight to the issue of fault. *Sparks, supra* at 158. Plaintiff is capable of finding work. She has been able to secure several positions throughout her lifetime with her experience in clerical and bookkeeping positions, and the job offer she received for a position in Iowa indicates she is still a desirable candidate to potential employers.

In addition, the six years that plaintiff was unemployed while caring for the parties' son does not constitute a substantial absence from the workplace that seriously cripples plaintiff's employability. See, e.g., *Socha v Socha*, 5 Mich App 404, 412; 146 NW2d 839 (1966) (holding

that a seven-year marriage did not constitute a sacrifice in years and refusing to award alimony). The marriage in the instant case was only eight years in length, and plaintiff did not sacrifice a great number of years by not working for just six years. As defendant indicates, plaintiff's full-time presence at home is no longer necessary because their son now attends school all day. The couple's remaining daughter, although not yet of school age, does not require the same high level of attention as their son did when he was ill. We also note that there was no evidence that defendant had or would acquire an interest in his father's company.

We agree with the trial court that there is no significant disparity between defendant and plaintiff's ages. In *Socha, supra* at 414, we noted that at forty-three years of age, the plaintiff was well able to support herself even when no evidence on employment possibilities was offered. At age forty-two, plaintiff is approximately the age of the plaintiff in *Socha*, and, as the trial court pointed out, she likely has twenty more years of employability before considering retirement. Finally, the job offer plaintiff received illustrates her continuing eligibility in the job market. Plaintiff's present situation does not imply that alimony is needed. In sum, we affirm the trial court's decision not to award alimony because it appears to have been fair and equitable. In any event, we are not firmly convinced that it was inequitable. *Sparks, supra* at 152; *Gates, supra* at 433.

Plaintiff next claims on appeal that the trial court abused its discretion in refusing to award her attorney fees. We agree.

While attorney fees in a divorce action are not recoverable as a matter of right, *Kurz v Kurz*, 178 Mich App 284, 297; 443 NW2d 782 (1989), "necessary and reasonable attorney fees may be awarded to enable a party to carry on or defend a divorce action." *Thames v Thames*, 191 Mich App 299, 310; 477 NW2d 496 (1991). A party requesting attorney fees "must allege facts sufficient to show that the party is unable to bear the expenses of the action, and that the other party is able to pay." MCR 3.206(c).

At the start of the divorce proceedings, without court intervention, defendant gave plaintiff \$1,000 to pursue the action. At trial, plaintiff requested \$3,200 to cover her expenses. The trial court held that each party was responsible for any indebtedness incurred by her or him since the filing of the divorce.

Plaintiff relies on *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999), where we stated that a party unable to bear expenses of attorney fees may recover reasonable fees if the other party is able to pay. In *Kosch, supra* at 352, 354, a wife who received \$1.2 million in marital assets could not show she was unable to bear the expense of the divorce action and was therefore not entitled to attorney's fees. However, in *Ozdaglar v Ozdaglar*, 126 Mich App 468, 473; 337 NW2d 361 (1982), we found that the plaintiff wife, who was still unemployed, was entitled to attorney fees even though she received a substantial amount of property on the ground that she should not have had to pay attorney fees from her share of the marital estate, which she needed to support herself. Unlike the plaintiff in *Kosch*, plaintiff does not retain substantially valuable property, and under *Ozdaglar*, even if she did, she would not be required to use her portion of the property division for attorney fees.

The record indicates that plaintiff had not secured a job in Michigan at the time of trial despite considerable efforts. Thus, under *Ozdaglar*, defendant, who was employed at the time of

trial with a substantial income, should have been required to pay plaintiff's necessary and reasonable attorney fees.

We affirm the lower court's denial of alimony, but we reverse the lower court's denial of attorney fees and remand this case for an appropriate award of attorney fees in favor of plaintiff. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ David H. Sawyer

/s/ Helene N. White